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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

EX PARTE APPLICATION OF PALANTIR)
TECHNOLOGIES, INC. FOR AN ORDER) NO. C 18-MC-80132-JSC
PURSUANT TO 28 U.S.C. § 1782 TO)
OBTAIN DISCOVERY FOR USE IN)
FOREIGN PROCEEDINGS.)

San Francisco, California
Thursday, December 6, 2018

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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1 Thursday - December 6, 2018

9:23 a.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling Civil Action 18-MC-80132, in re
4 Palantir Technologies, Inc.

5 **THE COURT:** Okay, go ahead and make your appearances.

6 **MR. STECHER:** Good morning, Your Honor. I'm
7 Christopher Stecher from Keesal Young & Logan on behalf of the
8 applicant Palantir.

9 I'm here with my colleague, David Livshiz, from the
10 Freshfields firm, who will be arguing on behalf of the
11 applicant.

12 **THE COURT:** All right, good morning.

13 **MR. DiCANIO:** Good morning, Your Honor. Jack DiCanio
14 on behalf of Mr. Abramowitz.

15 **THE COURT:** Good morning.

16 **MR. WOHLGEMUTH:** Good morning, Your Honor. Steve
17 Wohlgemuth on behalf of Mr. Abramowitz.

18 **THE COURT:** Good morning.

19 **MR. MELIUS:** Good morning, Your Honor. Niels Melius
20 on behalf of Mr. Abramowitz.

21 **THE COURT:** All right. Good morning.

22 So we're here -- this is a tiny battle in a much larger
23 war. So, I get that.

24 So let me first ask, I guess, Mr. Livshiz, what currently
25 is the status of the German action?

1 Has any action been filed challenging the healthcare
2 patents yet?

3 **MR. LIVSHIZ:** Your Honor, let me take that in turns.
4 The status of the cyber action that was filed in Germany
5 in August is that it is currently pending service by the
6 Department of State.

7 Under German law, Mr. Abramowitz either has to appear in
8 Germany and accept service, which he has declined to do, or
9 service has to be made by the Court through the official
10 channels of the Department of State.

11 That process has started beginning -- since the beginning
12 of October. And we understand it will be complete soon. But
13 that part of it is pending with the Department of State.

14 **THE COURT:** Okay.

15 **MR. LIVSHIZ:** The healthcare act -- the healthcare
16 action, rather, Your Honor, given the time period that has
17 passed in trying to serve Mr. Abramowitz, our intent now is
18 to -- once service is made and he appears, to avail ourselves
19 of the opportunity to amend the German action to include the
20 healthcare claims, rather than taking another three months to
21 effect service.

22 **THE COURT:** Okay. Because then you could just serve
23 whatever counsel is representing him.

24 **MR. LIVSHIZ:** Correct.

25 **THE COURT:** Okay. All right. And then with respect

1 to the state-court action, has -- have the -- has the revised
2 trade secret list been filed yet?

3 **MR. LIVSHIZ:** It has. It was filed on October 30th.
4 I understand that Mr. Abramowitz intends to object yet again.

5 I also understand that under the rules of -- the
6 individual practices rules of the judge hearing the California
7 action, there needs to be an initial conference before the
8 objections can be filed and briefing takes place.

9 And I understand that that -- Mr. Abramowitz proposed that
10 that conference go forward I guess in February, which means
11 that the briefing would take place at the end of Quarter 1, and
12 the decision would be in Quarter 2.

13 **THE COURT:** Okay.

14 **MR. LIVSHIZ:** Your Honor, if I may, that's important
15 for us for the following reasons, which is once the German
16 action is served, the German calendar is actually very
17 different than the calendar in the United States.

18 Assuming that service is effected by Christmas, our trial
19 in Germany would be before next Christmas, which means we would
20 need to submit all of our evidence no later than August.

21 **THE COURT:** Okay. All right. That's fine. Okay, so
22 whoever is arguing for Mr. Abramowitz.

23 So, so, let's just start -- I kind of just want to go
24 through the *Intel* factors because I don't think -- I'm not
25 inclined to sort of deny the application outright because of

1 bad faith. As I said, this is one tiny battle in a much larger
2 war.

3 And I -- I note that the Delaware court actually had
4 suggested that Mr. Abramowitz was using that litigation in
5 order to obtain discovery for another purpose. So, I don't
6 want to hear that. I get it. I have a lot of litigations like
7 that -- this, and I understand all that.

8 And it may very well be that the German action is being
9 used in part to get discovery for other things. But as long as
10 the German action is different -- I mean, that's something I'll
11 consider, but I'm not inclined to deny.

12 I am interested a bit in timing. But first, let's just
13 figure out if the discovery -- how I would exercise my
14 discretion there.

15 So the first factor is the fact that Mr. Abramowitz will
16 be -- although, I don't know, I don't -- what do I do about the
17 fact that he's refused to accept service?

18 In other words --

19 **MR. DiCANIO:** Well, Your Honor, I think that there is
20 context that counsel omitted.

21 Right now, there is a motion pending before the state
22 court. It's an anti-suit injunction that we filed before the
23 state court, asking the state court to enjoin Palantir from
24 proceeding in the German action.

25 And the reason for that is that -- if you recall from our

1 papers, that there is a forum selection and waiver provision in
2 the agreement called the transfer agreement, the 2012 transfer
3 agreement, that Palantir has based its claim in the state court
4 to say that we provided information to Mr. Abramowitz. That
5 information was covered by this provision. And he breached
6 that provision by taking these trade secrets and seeking patent
7 applications from them.

8 So we've moved before the state court to enjoin Palantir
9 from proceeding in Germany. That hearing is set --

10 **THE COURT:** Of course, you could just accept service
11 and make that motion in Germany. I mean, it's always --
12 that's -- okay, you can make that motion. I'm not sure -- I'm
13 not going to comment on that. I wasn't that persuaded by it.

14 But in any event, you want a state court to enjoin a
15 foreign proceeding. Okay. But -- I'm not that -- you can do
16 that there; you can do that. My question -- let's just go to
17 the factors. I'm not going to deny that. And if that happens,
18 then that happens.

19 The timing is a different matter.

20 **MR. DiCANIO:** No, I understand. But Your Honor, I
21 believed your question was --

22 **THE COURT:** Why doesn't he accept.

23 **MR. DiCANIO:** Because we feel that that is not an
24 appropriate proceeding. And so we want to challenge that in
25 the state court --

1 **THE COURT:** Why don't you challenge it in Germany?

2 **MR. DiCANIO:** Well, because, Your Honor, it is a
3 California resident in a case against a company who's
4 headquartered in California. Where we have been litigating
5 the very same facts, now, for two years.

6 **THE COURT:** Okay. But the case is about a German
7 patent. Presumably, he went to Germany to get it.

8 **MR. DiCANIO:** Your Honor, the case is about --

9 **THE COURT:** The case in Germany.

10 **MR. DiCANIO:** The case is still about what Palantir
11 alleges was information provided by Palantir to Mr. Abramowitz
12 while he was a shareholder, that they claim Mr. Abramowitz
13 then took to file patent applications --

14 **THE COURT:** In Germany.

15 **MR. DiCANIO:** And in the United States.

16 **THE COURT:** I understand that. But in Germany, as
17 well. It's not like he didn't do anything in Germany.

18 **MR. DiCANIO:** Correct, but --

19 **THE COURT:** That's fine. I understand why he didn't
20 accept service.

21 Let me ask you this. Assuming he gets served, your
22 argument is because he -- well, your argument is he'll never be
23 a party there. Okay. But let's assume he's a party in
24 Germany. They offer evidence that the German court can request
25 the production of documents from somebody who doesn't reside

1 there, even if they're a party, but can't compel it.

2 And I didn't see anything in your papers that disputed
3 that sort of legal proposition as to the authority of the
4 German court.

5 **MR. DiCANIO:** Well, Your Honor, they haven't even
6 asked the German court. What they did was they filed suit,
7 and then four days later --

8 **THE COURT:** No, do you -- you're not answering my
9 question. I read through the papers. I understand that. Do
10 you dispute that legal proposition?

11 **MR. DiCANIO:** Well, Your Honor, I believe that the
12 German court has discretion to order discovery that is in
13 front of it. I don't know the limits of that discretion.

14 But I --

15 **THE COURT:** Well, why not?

16 So would you stipulate on the record, should your client
17 be made a party to that action, that he would comply with any
18 request of the German court?

19 **MR. DiCANIO:** Of course, Your Honor. If he is
20 subject to their jurisdiction and is participating in that
21 action, he would comply with whatever order the court issues.

22 **THE COURT:** Even if it's a request, because they
23 don't have the authority to compel.

24 **MR. DiCANIO:** Well, Your Honor, I haven't discussed
25 that with my client. But I would imagine if he is

1 participating in that litigation and is defending that
2 litigation, that he would comply with whatever requests are
3 made.

4 **THE COURT:** Well, why don't -- you read the papers
5 that were filed by Palantir.

6 **MR. DiCANIO:** Yeah.

7 **THE COURT:** And they have -- who is it, Mr. Wapner?
8 Your expert.

9 **MR. LIVSHIZ:** No, Mister -- Prince Waldeck,
10 Your Honor, yes.

11 **THE COURT:** "Prince" is his first name? Or he's a
12 prince?

13 **MR. LIVSHIZ:** I believe -- it's actually the title.
14 We can refer to him as "Dr. Waldeck" for the purposes of the
15 proceedings.

16 **THE COURT:** Okay, because that's just weird. Okay?

17 **MR. LIVSHIZ:** Fair enough.

18 **THE COURT:** The Doctor in his declaration -- I think
19 it was Paragraph 4.

20 Right? You know what I'm referring to?

21 **MR. DiCANIO:** Yeah.

22 **THE COURT:** So given that, and assuming that is the
23 law, would you stipulate on the record that your client would,
24 nonetheless, agree to comply with whatever the German court
25 requested?

1 **MR. DiCANIO:** May I have a minute, Your Honor?

2 **THE COURT:** Yes.

3 **MR. LIVSHIZ:** And then, Your Honor, if I may have an
4 opportunity?

5 **THE COURT:** Of course.

6 (Off-the-Record discussion between counsel)

7 **THE COURT:** I think I have the wrong paragraph. It
8 was Paragraph 13.

9 **MR. DiCANIO:** I knew which one you meant, Your Honor.

10 **THE COURT:** Yeah.

11 **MR. DiCANIO:** Your Honor, I'm a little bit hesitant,
12 only because I haven't posed that question to my client. I
13 don't anticipate an issue. But it's certainly something that
14 I can clear up very quickly after the hearing.

15 **THE COURT:** Okay. I would anticipate an issue, given
16 the war that is going on. But -- okay.

17 Because that's what I think the factor, the first *Intel*
18 factor, the reason it matters if someone is a party to the
19 litigation or not, because as, of course, the Court can order
20 the discovery, then you don't so much need the order from the
21 Court in the United States. You need that when you have third
22 parties who not are before the Court.

23 So I think the fact that Mister -- everyone seems --
24 Abramowitz?

25 **MR. DiCANIO:** Abramowitz.

1 **THE COURT:** -- Abramowitz is a party there, that's
2 only half the inquiry. And I don't accept -- even though I
3 know you cite some cases that seem to accept that that, in and
4 of itself, is enough.

5 Okay. So, why wouldn't, if that's the case -- if, if we
6 have that stipulation on the record, this case is here, should
7 they violate that stipulation.

8 **MR. LIVSHIZ:** Uh-huh.

9 **THE COURT:** Why wouldn't that be enough, then?

10 **MR. LIVSHIZ:** Well, Your Honor, so there's two, two
11 points there.

12 First, if you look at Paragraph 12 of the Waldeck
13 declaration, he makes a more fundamental point. And this has
14 been a point that has been accepted by a number of U.S.
15 tribunals, or courts, rather, which is: German courts can --
16 do not understand the concept of discovery as we understand it
17 today. The most that they could do would be to request
18 Mr. Abramowitz to turn over a specific document, which we would
19 first have to identify by name, rank and serial number.

20 And what I mean by that, we would have to say: This is an
21 email from Mr. Abramowitz to Palantir, on Date X, and we would
22 like him to produce a copy of that email.

23 That is very different than the discovery that we seek and
24 that we will need to defend ourselves -- or to prosecute our
25 action.

1 I would commend to you Judge Posner's decision in the
2 *Heraeus* case in the Seventh Circuit, which we cited in both our
3 opening application and our reply, where Judge Posner goes on
4 at length about particularly in cases like this, 1782 discovery
5 is appropriate.

6 Also, Your Honor, I've prepared a small guide to sort of
7 help through the day (Indicating). If I could hand up --

8 **THE COURT:** The day, oh, we're not here for the day.

9 **MR. LIVSHIZ:** Well, hopefully the -- our meeting
10 together this morning.

11 I do have a copy for Mr. Abramowitz's counsel. If I could
12 hand up a copy to you and a copy to him?

13 **THE COURT:** Sure.

14 **MR. DiCANIO:** Your Honor, I would just say I object,
15 in the sense that we should have been given had a copy of this
16 before the hearing. We were all seated outside for a long
17 time before the hearing. So this is the first time I'm seeing
18 this.

19 (Document tendered)

20 (Document handed up to the Court)

21 **THE COURT:** It's just a demonstrative. And at the
22 end of the hearing, I will hand it back to alleviate any
23 concern that I would consider material anything other than as
24 a demonstrative.

25 Okay?

1 **MR. LIVSHIZ:** So if you turn to Slide 5, Your Honor
2 this is just four cases which are similarly postulated as us.
3 Where discovery has been granted under 1782 in aid of German
4 proceedings.

5 And we cited, for example, *Cryolife* in our papers.

6 **THE COURT:** Did you cite the other three in your
7 papers?

8 **MR. LIVSHIZ:** We cited, I believe, *Procter & Gamble*.
9 I don't think we cited the first two.

10 **THE COURT:** Then I'm not going look at them. So, I
11 just have to tell you. And, you know what the rules are,
12 right? You can't come to court and cite a case that you
13 didn't cite --

14 **MR. LIVSHIZ:** Okay.

15 **THE COURT:** -- in your papers. So you can't use it
16 in your demonstrative, either. So I'm crossing them out.

17 **MR. LIVSHIZ:** That's fair enough. But I'll rest on
18 the other two, Your Honor.

19 **THE COURT:** Okay. But in those cases, was the party
20 from whom they were seeking discovery, were they parties --

21 **MR. LIVSHIZ:** Yes --

22 **THE COURT:** -- to the foreign litigation?

23 **MR. LIVSHIZ:** Yes.

24 **THE COURT:** Okay. They were parties.

25 **MR. LIVSHIZ:** All of those cases are

1 American-versus-American litigation in Germany. 1782 in the
2 United States.

3 **THE COURT:** No, I understand it was American versus
4 American. But was the American a party to the German
5 litigation?

6 **MR. LIVSHIZ:** Yes. In both of those cases, that was
7 the case. We cited some additional cases in our papers, as
8 well.

9 **THE COURT:** Did you want to say anything about those
10 cases?

11 **MR. DiCANIO:** There's one very big difference,
12 Your Honor. And I think we're starting by kind of missing
13 this fact. And that is that what's different here is that we
14 have a case pending in California.

15 And what this -- what 1782 application is doing here, it's
16 allowing them to get access to discovery where, under
17 California law, they're not entitled to it yet, because they
18 haven't met the standards that California requires.

19 **THE COURT:** No, I understand that. But to me, that's
20 a question of timing, I guess. So, and maybe --

21 **MR. WOHLGEMUTH:** No, Your Honor, and that's where
22 they've misstated. It's not a question of timing.

23 Under California law, they have articulated this in their
24 briefing to you as: Well, this is about how to structure
25 discovery.

1 That's really only a small part of the California trade
2 secret regime. What California law is saying is: Listen,
3 we're worried about abusive actions being filed against
4 defendants where trade secret allegations are made, with
5 unspecified allegations.

6 And such, you start this process, you have a very liberal
7 pleading standard that we have in California. And then you get
8 all of this discovery from your opponent about all of their
9 confidential and proprietary information.

10 So what California says is: We're not going to allow you
11 to do that. We're not going to allow you to proceed in this
12 case, unless you could satisfy a certain standard.

13 **THE COURT:** That's what I'm saying. It's about
14 timing. Right? So it may be timing in terms of when you get
15 the German discovery. That's what I'm saying it may be about
16 timing.

17 Once the trade secret case is going forward in California,
18 right, then that argument disappears. Because the judge had
19 said: Okay, you've sufficiently identified your trade secrets,
20 and then it's going forward.

21 That's the timing I'm talking about. So --

22 **MR. DiCANIO:** Or -- Your Honor -- I'm sorry to
23 interrupt Your Honor.

24 **THE COURT:** Go ahead.

25 **MR. DiCANIO:** Or, or -- we've been at this for two

1 years. And they haven't been able to meet the reasonable
2 particularity standard that's required under the statute.

3 This is all about the strike 3 in that action. Because
4 the Court has the discretion to say: You know what? I've given
5 you, now, three tries. I'm dismissing the action.

6 **THE COURT:** Okay. Well, then, then that action isn't
7 a reason not to go forward with the discovery here.

8 **MR. DiCANIO:** Then, Your Honor, we see where we are
9 at that point in time.

10 **THE COURT:** That's why I'm saying it's a timing. I -
11 I hear that.

12 **MR. DiCANIO:** Yeah.

13 **THE COURT:** But by the way, you know -- because you
14 actually wanted to be in Federal Court, right? You originally
15 -- and do you know that many judges on this Court do not
16 enforce that state trade secret law, because they say it's
17 procedural and not substantive?

18 I don't know. That's just a little bit of irony.

19 **MR. DiCANIO:** I didn't know that, Your Honor. But I
20 will tell you, in California state litigation, it becomes a
21 very, very important gating issue that there's a lot of
22 litigation over, and Judge Arand in the state court has spent
23 a lot of time on.

24 We've been through this for two years with these folks.

25 **THE COURT:** No, no, no, I understand that. I

1 understand that. Did you want to -- I mean, I guess part
2 of -- and we'll just sort of the cut to it, why don't we just
3 cut to it. Which, I do think some of their discovery they are
4 seeking would be relevant and appropriate in the German case.
5 I don't know why you need it today.

6 **MR. LIVSHIZ:** Your Honor, let me just take a moment
7 and explain what's happening. And I do think that there's a
8 different solution that would address both Mr. Abramowitz's
9 concerns, and would allow us to prosecute our action in
10 Germany.

11 And the concern is this: Mr. Abramowitz filed his patents
12 in Germany. In late 2017 and early 2018, he has abandoned
13 them. That has a unique effect under European law which is
14 different than the United States. It means we cannot now apply
15 for that patent which we believe to properly belong to us,
16 until we have a court declaration saying that the patent -- we
17 are entitled to the patent (Indicating quotation marks). That
18 is the nomenclature of the German proceeding.

19 The longer we go before we have a trial and a verdict, the
20 less likelihood under German law that we will be able to
21 enforce our rights under the patent. Because in the interim,
22 the patent has been abandoned, and other market participants
23 can fill the space. And their interests over time increase,
24 and our interests in securing our invention over time decreases
25 in Germany.

1 **THE COURT:** No, I understand that. But why shouldn't
2 we at least wait until he is served, and the case is moving
3 forward? Because nothing can happen until he's served.

4 **MR. LIVSHIZ:** Fair enough, Your Honor. I don't think
5 we have a problem waiting until he's served. I do think we
6 have a problem waiting until the state court resolves the
7 issues I just noted.

8 Mr. Abramowitz proposed the initial conference on the
9 third round of objections for February. That motion may not be
10 decided until June. We need to submit all of our evidence,
11 assuming we get served, by August.

12 But what we did propose in our papers and what
13 Mr. Abramowitz hasn't responded to at all is if the concern is
14 that we will use German discovery to enhance our position in
15 the California litigation, we have a solution, which is: We
16 are not involved in the California litigation.

17 **THE COURT:** Uh-huh.

18 **MR. LIVSHIZ:** Freshfields is German counsel, and
19 counsel for the purposes of this arbitration -- this
20 proceeding, only.

21 **THE COURT:** Ah.

22 **MR. LIVSHIZ:** And we will enter into a protective
23 order that limits who can see the documents to, for lack of a
24 better word, Freshfields and European counsel.

25 **THE COURT:** Ah, almost like a patent prosecution bar.

1 **MR. LIVSHIZ:** I'm not familiar, so I'm hesitant to
2 agree. But the idea is we will limit who can see the
3 materials only to the people who are working on the European
4 litigation who will not work on the California action.

5 **THE COURT:** That seems like a fair compromise.
6 Again, I --

7 **MR. DiCANIO:** It's not fair at all. Your Honor, with
8 all due respect, it's not fair at all, for this very same
9 reason.

10 Think about where we are in this miscellaneous proceeding
11 filed before you. They have a German proceeding that they
12 filed in. But they haven't even served the defendant yet.

13 **THE COURT:** Well --

14 **MR. DiCANIO:** They haven't asked --

15 **THE COURT:** No, now, let me finish. That argument is
16 not that persuasive. They tried to serve him, and your client
17 refused service.

18 **MR. DiCANIO:** Your Honor --

19 **THE COURT:** So now they're having to go through the
20 State Department, which is a process that began in October.
21 So, that process.

22 But once he's served, once he's served, and the German
23 case then is moving forward, what's wrong with their proposal?

24 **MR. DiCANIO:** Because what the Court is being asked
25 to do is being asked to give them a right to discovery -- when

1 you are a third party in this litigation in some sense -- that
2 the German court may or may not give them, right, based upon
3 their request to the German court.

4 **THE COURT:** That's not a good argument under *Intel*.

5 **MR. DICANIO:** Where the state of California -- but
6 here's what the *Intel* court didn't talk about and the cases
7 that they cite don't talk about.

8 There is litigation pending in California between
9 Mr. Abramowitz, a California resident, and Palantir,
10 headquartered in California. And they are litigating the same
11 nucleus of facts.

12 And in that case, under California law, where all of the
13 parties are subject to -- because California has
14 jurisdiction -- is saying: You don't get this discovery,
15 because you haven't reasonably identified with particularity
16 your trade secrets.

17 **THE COURT:** You don't get discovery for use in the
18 California action, and they're agreeing. We cannot use it in
19 the California action. And we will ensure we won't give it
20 to -- it would be attorneys' eyes only.

21 Right?

22 **MR. LIVSHIZ:** Yeah.

23 **THE COURT:** It would be attorneys' eyes only, and
24 only those attorneys working on the German case who are not
25 working on the California case.

1 "We agree with you," they're saying. "We agree with you.
2 You're right; that would be unfair for us to be able to use it
3 in the California action."

4 **MR. DiCANIO:** But Your Honor, again, he still needs
5 to be served. Two, they need to make the request to the
6 German court.

7 And, and I guess the way we look at this is: Why is this
8 Court getting in the middle of both of those situations, in a
9 situation where the underlying action is already being
10 litigated?

11 **THE COURT:** So I'm not getting -- we are not getting
12 involved in the California action, because they've agreed that
13 it can't be used in the California action. So now all we're
14 talking about is the German action.

15 You don't dispute that the only way they could get his
16 claimed inventorship vacated is in Germany. That can't be done
17 in California.

18 **MR. DiCANIO:** I don't agree with that, Your Honor.

19 **THE COURT:** Well, I don't have anything in front of
20 me, and that seems --

21 **MR. DiCANIO:** Well, Your Honor, that's the whole
22 point of the California case. The whole California case is
23 about who invented these trade secrets.

24 It's -- it is them saying that: These patents that you
25 filed in the U.S., right, those were our trade secrets. We

1 told you about them. You took that information, and then you
2 stole that from us, and you went ahead and you filed patent
3 application.

4 That will necessarily be decided in the California action
5 as to: Who invented this technology. Was it Palantir? Or was
6 it Mr. Abramowitz? That is part of it. What they've done is
7 confused the issue by pointing to the remand order from the
8 Federal Court.

9 And really, what the Court was saying was that
10 inventorship was not the exclusive claim that was in the case,
11 because they brought also breach of contract and other types of
12 claims related to the trade secret and related to the 2012
13 transfer agreement. And so, Your Honor, it is very much
14 central figure in this.

15 And this is why I think all of this seems wrong to me.
16 Because if this gets litigated in California, there will be a
17 determination. They could get damages in California, because
18 they made a request for damages, for all damages that flowed
19 from the communication of these trade secrets to third parties,
20 whoever they are.

21 They can get an injunction to enjoin Mr. Abramowitz in the
22 California action. They asked him to either withdraw or amend
23 his applications.

24 All of the relief that they are seeking in Germany, they
25 can get in California. But here's what they did.

1 **THE COURT:** No, they can't. The California court
2 can't do anything with that German patent.

3 **MR. DiCANIO:** They absolutely can, Your Honor. And
4 they haven't answered this.

5 The California court could enjoin Mr. Abramowitz, and say:
6 You must amend or withdraw that application. That's their
7 request in the state court.

8 **THE COURT:** The German patent?

9 **MR. DiCANIO:** They have jurisdiction over
10 Mr. Abramowitz because he's a citizen; he's a party to the
11 litigation. And they could enjoin him, and say: You need to
12 withdraw or amend your patent applications in the U.S. and in
13 Germany.

14 They have not cited a single case that suggests that the
15 state court doesn't have that authority.

16 **THE COURT:** When is your motion being heard, the one
17 in the state court you said --

18 **MR. DiCANIO:** It's January -- can I just check --

19 **MR. LIVSHIZ:** Then, Your Honor, if I may respond,
20 because there's two areas that are --

21 **MR. DiCANIO:** January 15th, Your Honor.

22 **MR. LIVSHIZ:** Okay.

23 Your Honor, the problem with Mr. Abramowitz's argument is
24 the following: As a matter of European law, any declaration of
25 the California court is, frankly, irrelevant. This is a

1 decision that, under European patent convention, has to be
2 rendered by the Munich court.

3 Second of all, just as long as we're talking about the
4 remand decision, Your Honor, I would point you to Judge
5 Hamilton's decision. And this is at Page 5 --

6 **THE COURT:** So about how -- with the -- for the
7 domestic patents, there was only the PTO that could do
8 anything, and that the court would -- no, I understand that.
9 I understand that.

10 I don't -- but so this is -- this is --

11 **MR. DiCANIO:** Your Honor, can I respond to that?

12 **THE COURT:** No, no. Let me finish.

13 This is what I think needs to be done, because I think it
14 -- it gets us a little time. Mr. Abramowitz needs to be served
15 in Germany.

16 **MR. LIVSHIZ:** Yes.

17 **THE COURT:** Because, as you concede, if he hasn't
18 even been served yet, nothing's going to happen; you don't
19 need that.

20 **MR. LIVSHIZ:** Yes.

21 **THE COURT:** Once that happened and something actually
22 happens, then we'll actually -- well, and given that, then you
23 have your argument as to -- or your agreement that you would
24 create some sort of wall --

25 **MR. LIVSHIZ:** We are happy to look at any protective

1 order --

2 **THE COURT:** Right, which this Court would maintain
3 jurisdiction of.

4 **MR. LIVSHIZ:** Of course, Your Honor.

5 **THE COURT:** Right. Wouldn't see it. By then,
6 though, I assume -- we're in December -- your motion would
7 have been heard.

8 **MR. DiCANIO:** (Nods head)

9 **THE COURT:** If your motion is denied, frankly, that
10 weakens your argument a lot. Because that's essentially the
11 argument that you're making there. And so then I'll decide
12 this motion in that context.

13 **MR. LIVSHIZ:** Okay.

14 **MR. DiCANIO:** Fine, Your Honor. Can I just make one
15 more point? You've been so patient.

16 **THE COURT:** Okay.

17 **MR. DiCANIO:** More patient than I would have been, I
18 think, if our roles were reversed.

19 He's absolutely wrong (Indicating). German courts do
20 recognize U.S. judgments.

21 And too, what he's missing is that it would be an order
22 from the state court saying to Mr. Abramowitz: You must amend
23 or withdraw that application. So he would have to take
24 affirmative action to address that situation.

25 And they have cited nothing in their papers -- although we

1 raised it -- saying that that would not be -- that that would
2 not work and not be effective in Germany.

3 **THE COURT:** Okay, I don't need to decide that. And
4 basically, you have your argument in front of the state court
5 right now, --

6 **MR. DiCANIO:** Yes.

7 **THE COURT:** -- asking the judge to stay the German
8 court. If you win that, great. If you lose that, then I
9 think those arguments are not very good at that point.

10 But, you said it's going to be heard January 15th. I'm
11 inclined to wait until after that, because I don't see any
12 reason why I need to rule today, given that your client hasn't
13 been served yet.

14 **MR. DiCANIO:** I understand.

15 **THE COURT:** Right? I shouldn't -- then there's no
16 reason you need it right now.

17 Now, I'm sure I have a representation on the record that
18 everything they're seeking is being preserved.

19 **MR. DiCANIO:** Yes, Your Honor.

20 **THE COURT:** Okay. All right. And we're not
21 concerned --

22 **MR. DiCANIO:** Well, it's the exact same stuff that's
23 subject to the discovery in California. That's what's going
24 on here.

25 **THE COURT:** Okay. All right, fine. So, so there

1 isn't that concern, as well.

2 **MR. LIVSHIZ:** Uh-huh.

3 **THE COURT:** So then what I think we should do, then,
4 is once -- and don't have your client continue the hearing in
5 January before the state-court judge.

6 **MR. DiCANIO:** No. We're -- we're eager to be in
7 front of her.

8 **THE COURT:** All right, good. Then once they've been
9 served, and that hearing occurs on January 15th, then why
10 don't we do this. Set up a conference call with -- a status
11 with Ms. Means. And then we can talk about having a hearing.
12 I imagine you probably all want to come in person again,
13 because everyone likes visiting San Francisco. Or we can do
14 it by telephone.

15 We'll do this conference call status by telephone, and we
16 can talk about how to proceed at that point. Whether I should
17 just take it under submission; whether you want to submit
18 additional materials in light of the developments in the case.
19 Or, or whether you want another hearing.

20 **MR. LIVSHIZ:** That sounds great for us, Your Honor.

21 I would just note that on the very last point that was
22 said, German courts recognize U.S. judgment. This is not that
23 particular question. As explained at length in Dr. Waldeck's
24 reply declaration at Paragraph 8, this particular issue has to
25 be adjudicated by a German court.

1 I would also note that Skadden Arps, who is counsel for
2 Mr. Abramowitz, has a huge litigation practice in Munich. And
3 we have not seen a single declaration on German law on
4 opposition, on their proposed surreply, or now, indeed, on the
5 California --

6 **THE COURT:** Okay. But I guess I'll just -- just on a
7 level up here (Indicating), all of these arguments, in effect,
8 are being made to the state court. That they should enjoin
9 the German action.

10 **MR. DiCANIO:** They are, Your Honor.

11 **MR. LIVSHIZ:** Yeah.

12 **THE COURT:** If the state court's enjoined the German
13 action, then there we are. If the state court doesn't, then
14 the German action is going forward, and there we are.

15 **MR. LIVSHIZ:** Okay.

16 **THE COURT:** So I do think, actually, that makes
17 sense.

18 **MR. LIVSHIZ:** Okay.

19 **THE COURT:** And works with the timing, in any event,
20 since Mr. Abramowitz has not been served.

21 **MR. LIVSHIZ:** Okay.

22 **THE COURT:** So I'm going to leave it to you, then, to
23 contact counsel and Ms. Means to set up the status call, once
24 he's been served and the hearing has occurred.

25 **MR. DiCANIO:** Thank you, Your Honor.

1 **MR. LIVSHIZ:** Thank Your Honor.

2 **MR. DiCANIO:** Appreciate your patience.

3 **THE COURT:** Okay. Thank you.

4 Oh, I'll give this (Indicating) back, like I said.

5 (Document handed down)

6 (Conclusion of proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Belle Ball

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Tuesday, December 11, 2018